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IN THE

Supreme Court of the United States

OCTOBER TERM, 1932.

No. 346.

UNION BANK AND TRUST COMPANY,
Petitioner,

VS.

R. C. PHELPS, INDIVIDUALLY AND AS TAX COLLECTOR OF MONTGOMERY COUNTY, ALABAMA,
Respondent.

Reply brief of Respondent to petition for writ of certiorari to the Supreme Court of the State of Alabama, and brief in support thereof.

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Reply brief of Respondent to petition for writ of certiorari to the Supreme Court of the State of Alabama, and brief in support thereof.

STATEMENT OF THE MATTER INVOLVED.

This cause comes to this Court by petition for writ of certiorari to the Supreme Court of Alabama. The opinion of that Court in the case being reported in 142 So. 552, and appears in the record here at pages 39, 40 and 41.

There are two questions presented by this petition:

First. Does the exemption of certain property defined by Federal Courts as "moneyed capital" within the meaning of Section 5219, from ad valorem taxation invalidate the taxation of the shares of a state bank under the Fourteenth Amendment?

Second. Does the failure to tax the shares of national banks, because the State has not met the conditions prescribed by Section 5219 of the Revised Statutes, render the taxation of the shares of a state bank invalid under the Fourteenth Amendment?

The Petitioner, a State Bank, brought suit at law in the Circuit Court of Montgomery County, Alabama, against R. C. Phelps, the Tax Collector of said County, to recover the sum paid by it under protest on account of ad valorem tax assessment for State and County purposes against the shares of Petitioner. The grounds of the suit were in substance these; that the State of Alabama had exempted the shares of building and loan associations, mortgage companies, corporations making loans on real estate or purchasing notes on real estate, and industrial loan companies or corporations, from share taxation; that there is also exempted from ad valorem taxation mortgages together with the notes, debts and credits secured thereby, provided such mortgages had been filed for record and the privilege tax paid thereon; that the national banks located in Montgomery and other parts of Alabama had been relieved of the ad valorem taxation on shares because the failure of the State to tax such forms of property, had been held to violate Section 5219 of the Revised Statutes of the United States, as amended.

Petitioner claimed that the failure to tax these forms of property alleged to be moneyed capital in competition with it, violated Sections 211 and 217 of the Alabama Constitution and the equality clause of the Fourteenth Amendment of the Constitution of the United States.

Petitioner further claimed that the failure or inability to tax the shares of national banks likewise constituted a violation of Sections 211 and 217 of the State Constitution, and also of the equality clause of the Fourteenth Amendment.

Respondent by way of demurrer and answer plead defenses which in brief were as follows:

(1) That he was not indebted in the manner and form alleged.

(2) That no appeal had been taken from the assessment and no protest made until the time the taxes were paid and that the protest and suit for recovery came too late.

(3) That there is no classified property taxation system in the State of Alabama and that the arrangement of state and national banks in one Section as appears in Section 6 of the Act approved August 22, 1923, is not a classification for taxation purposes but is a method of assessment. That the Legislature cannot and did not by such procedure classify property nor levy different rates of taxation but taxed all property declared by it to be taxable at the same rate. Defendant admits that the shares of certain national banks presumably competing with plaintiff have escaped share taxation, but defendant avers that this is by virtue of the limitations put upon the State's power to tax them by the Congress of the United States, and that by the law of the State of Alabama they are taxed at the same rate as plaintiff. And defendant avers that the states have no power to tax national banks except as given it by Congress and that the failure or refusal of Congress to give plenary power to the states in the matter of share taxation, cannot relieve the defendant of its liability for such taxes and that the failure to tax the shares of national banks because of congressional limitations does not constitute a discrimination in violation of the State or Federal Constitutions.

(4) Defendant further avers that the Legislature has the right and power to select its own subjects of taxation and to exempt such as it sees fit. That the exemption of shares of mortgage companies and the other species of property named in the complaint is the legitimate prerogative and its exercise does not

constitute the taxation of property at a different rate and contrary to Sections 211 and 217 of the State Constitution. Defendant further avers that such exemptions do not render the taxation of plaintiff's shares void and unconstitutional.

Record, pages 22 and 23.

The statement of fact is set out on pages 28 and 34, inclusive, of the Record.

In brief it discloses that certain forms of property declared by the Federal Courts to be moneyed capital within the meaning of Section 5219 of the Revised Statutes, are exempt from taxation or are taxed at a lesser rate in the sense of burden imposed than are the shares of Petitioner. It is to be particularly noted that in every case where reference is made to property being taxed at a lesser rate, the words "in the sense of burden imposed" appear. This for the reason that the Court judicially knows that no taxable property in Alabama is taxed at a different rate, but presumably by virtue of such laws as the registration of mortgages and securities the burden of taxation is less than that of property taxed at regular ad valorem rates. These species of property are exempt from ad valorem taxation entirely; any taxes they pay are privilege taxes.

The Circuit Court rendered judgment in favor of the Petitioner. On appeal the Supreme Court reversed the judgment of the Circuit Court. The judgment of the Supreme Court appears in the Record on page 38. The opinion appears on pages 39 to 41, inclusive. The dissenting opinion appears on pages 41 to 56, inclusive, of the Record. From the decision of the Supreme Court of Alabama this petition for writ of certiorari is prayed.

BRIEF AND ARGUMENT

The Petitioner claims that the decision and judgment of the Supreme Court of Alabama violates the equal protection clause of the 14th Amendment because the shares

of corporations engaged in substantial competition with it are exempt, that moneyed capital in competition with it is exempt, and that the failure to levy a valid and legal tax on the shares of national banks is a violation of the equal protection clause of the 14th Amendment.

The Supreme Court of Alabama has decided that the taxation of the shares of State banks has not violated the equality clause of the State Constitution on any of the grounds urged by the Petitioner including those on which the protection of the 14th Amendment is here invoked. It likewise concluded "That the State system of taxation here questioned violates no provision of the 14th Amendment to the Constitution of the United States." It is to be noted that the dissenting opinion does not pass on the Federal question in any way.

We submit that the decision of the Supreme Court of Alabama removes any State question from discussion and the effect is to remove any Federal question.

THE EXEMPTIONS COMPLAINED OF DO NOT VIOLATE THE EQUAL PROTECTION CLAUSE OF THE FOURTEENTH AMENDMENT.

May we briefly summarize the facts and law involved:

The Constitution of Alabama declares that all property must be taxed at the same rate.

Constitution, Section 217.

This has been construed to apply to *taxable property* and not to apply to property exempt by law or to forbid the Legislature to make exemptions. We refer briefly to some of the cases:

> "The State has the power to exempt any class or item of property from taxation, and to declare what property shall be the subject of ad valorem or annual property taxation."

State vs. Birmingham Southern R. R. Co., 62 So. 77, 182 Ala. 475;
W. U. Telegraph Co. vs. State Board, 80 Ala. 273;
Phoenix etc. Co. vs. Montgomery, 117 Ala. 631;
Kidd vs. State, 188 U. S. 730.

"The power to classify is necessary to avoid oppressive results and is subject only to the limitations imposed by the State and Federal Constitutions. These limitations prohibit only those classifications which can be supported on no rational hypothesis."

W. U. Telegraph Co. vs. State Board, supra.

"Sections 211 and 217 of the Constitution of Alabama are not to be construed to prohibit exemptions from taxation nor reasonable classifications, nor to require the taxation of all property at precisely the same rate." M. & G. R. R. vs. Peebles, 47 Ala. 317;

Moog vs. Randolph, 77 Ala. 597;
Phoenix Co. vs. State, 118 Ala. 143.
In the present case the Court said:

"Upon the question of taxation, the Legislature of this State had the power to make exemptions and classifications free from interference by the courts unless there results inequality, not only oppressive in its operation, but so glaring as that it can be judicially declared to be founded on arbitrary and capricious principles, without the just semblance of reason. Subject to this limitation the legislative power to select proper subjects of taxation and to classify them upon principles which to them seem just, cannot be circumscribed by the courts. There must be, of necessity, left a liberal scope for the free exercise of this presumably wise discretion."

Apart from the question of national banks these decisions not only remove any State question, but we submit, also eliminate any Federal question.

The 14th Amendment does not require the states to follow any iron or set rule of taxation. The states can adjust their taxation system in whatever manner they deem fit so long as equal protection and due process are not denied.

The taxing power of the state is one of the highest attributes of sovereignty, essential to its continued existence, and may be exercised without limitation on all property, trades and business carried on within its boundaries unless prohibited by the State or Federal Constitutions.

> Railroad Company v. Peniston, 85 U. S. 5, at p 29;
> Royall v. Virginia, 116 U. S. 592, at p. 597.

In the exercise of its taxing power, the state, in the discretion of its legislature, may levy a privilege or occupation tax on *all occupations or business*, or it may *select* for taxation certain classes and leave the *others untaxed*.

> Armour Packing Co. v. Lacy, 200 U. S. 226, at p. 235;
> Southwestern Oil Co. v. Texas, 217 U. S. 114, at pp. 124, 125 and 126;
> Bell's Gap R. R. Co. v. Pennsylvania, 134 U. S. 232, at page 237;
> American Sugar Refining Co. v. Louisiana, 179 U. S. 89, at page 94;
> Hart Refineries v. Harmon, Treas., 49 Supreme Court Reporter, 188, at page 189.

In cases in which the Legislature selects certain classes for taxation, the classes so selected may be *further subdivided according to certain differences* without violating the *due process* and *equal protection* provisions of the Fourteenth Amendment to the Constitution of the United States, if the subdivisions are reasonable.

> Cooley on Taxation (4th ed.), Secs. 349-350;
> Southwestern Oil Co. v. Texas, 217 U. S. 114, at p. 126;
> Michigan Railroad Tax Cases, 138 Fed. 223, at p. 241;
> Metropolitan Life Ins. Co. v. City of Paris, 138 Ky. 801, 129 S. W. 112.

In determining whether a classification for an occupation tax is discriminating, the motives or special reasons actuating the legislature is of no concern to the court; neither is the wisdom of the classification of consequence. The determining factor lies in the answer to the question, does the burden fall alike upon all who are in substantially the same situation?

Cooley on Taxation (4th ed.), Section 350;
Southwestern Oil Co. v. Texas, 217 U. S. 114, at p. 126;
Oliver Iron Co. v. Lord, 262 U. S. 172, at p. 179;
Michigan Central R. R. Co. v. Powers, 201 U. S. 245, at p. 293;
Dane v. Jackson, 256 U. S. 589, at pp. 598-599;
Citizens Telephone Co. v. Fuller, 229 U. S. 322, at pp. 329-331;
McLean v. Arkansas, 211 U. S. 539, at p. 547;
Hart Refineries v. Harmon, Treas., supra.

A classification of occupations for taxation made by the legislature of a state which is not wholly unreasonable and arbitrary, and which is uniform in its operation on all members to which it is *made applicable*, is not violative of the equal protection guaranteed by the Federal Constitution.

Consumers' League v. Colorado, etc. R. Co., 125 Pac. 577;
Chicago, etc., R. Co. v. Arkansas, 219 U. S. 453, 466;
W. W. Cargill Co. v. Minnesota, 180 U. S. 453, 469.

The State is sovereign mistress of her own policy in establishing classes for the purpose of raising revenue by taxation and such classification will not be set aside except where there is no rational basis for the classification.

Ex parte Thornton, 12 Fed. 538;
Singer Sewing Mach. Co. v. Brickell, 233 U. S. 304.

The subjects and methods of taxation are legislative matters, and can not be disturbed so long as the method pre-

scribed is applicable alike to all within the prescribed class. Corporations, individuals, wholesale and retail dealers, domestic and foreign corporations may be separately classified and taxed differently, so long as all in the constituted classes are treated alike.

Kersey v. City of Terre Haute, 161 Ind. 471, at p. 472 et seq.;
State, ex rel Lewis, et al v. Smith, Aud., 158 Ind. 543, at p. 546;
Gafill v. Bracken, Aud., 195 Ind. 551, at p. 560;
State v. Hammond Pkg. Co., 233 U. S. 331.

In Bell's Gap Railroad Company v. Pennsylvania, 134 U. S. 232, this Court said:

* * * "The provision in the Fourteenth Amendment, that no state shall deny to any person within its jurisdiction the equal protection of the laws, was not intended to prevent a state from adjusting its system of taxation in all proper and reasonable ways. *It may, if it chooses, exempt certain classes of property from any taxation at all,* such as churches, libraries and the property of charitable institutions. *It may impose different specific taxes upon different trades and professions, and may vary the rates of excise upon various products;* it may tax real estate and personal property in a different manner; it may tax visible property only, and not tax securities for payment of money; it may allow deductions for indebtedness or not allow them. All such regulations, and those of like character, so long as they proceed within reasonable limits and general usage, are within the discretion of the state legislature, or the people of the state in framing their Constitution. But clear and hostile discriminations against particular persons and classes, especially such as are of an unusual character, unknown to the practice of our governments, might be obnoxious to the constitutional prohibition. It would, however, be im-

> practicable and unwise to attempt to lay down any general rule or definition on the subject, that would include all cases. They must be decided as they arise. We think that we are safe in saying that the Fourteenth Amendment was not intended to compel the state to adopt *an iron rule of equal taxation,* * * *"

Discrimination or difference in taxation of business conducted by a corporation and the same business when conducted by partnership or individual, has been sustained.

> Flint vs. Stone Tracy Co., 220 U. S. 107, 55 L. ed. 389.

A statute forbidding operation of cotton gins by corporations manufacturing oil or meal was held not an arbitrary classification, the Court saying:

> "Every state of facts sufficient to sustain such classification which can be reasonably conceived as having existed when the law was enacted will be assumed." Crescent Oil Company vs. Miss., 257 U. S. 129, 66 L. Ed. 166.

The method of assessing railway corporations may be different from that of assessing other corporations and such assessment may be by different assessing bodies.

> Ky. Railway Tax Cases, 115 U. S. 321, 29 L. ed. 414, Southern Railway vs. Watts, 260 U. S. 519, 67 L. ed. 375.
>
> "A state may without violating the Fourteenth Amendment confine the recovery of back taxes to those due from corporations."
>
> Fort Smith Lumber Co. vs. Ark., 251 U. S. 532, 64 L. ed. 396.

Assessing bonds and other securities of corporations at their par value, while other securities were assessed at their real value permitted.

> Bell's Gap Ry. Co. v. Pa., 134 U. S. 232, 33 L. ed., 892.

In Clark v. Titusville, 184 U. S. 329, 46 L. ed., 569, the Court sustained an ordinance of the city imposing a license tax on merchants by which they were divided into classes according to the amount of their sales, each class including those whose sales ranged between a certain minimum and maximum amount, although the result was to make persons in different classes pay different rates, and to make those in the same class pay at a different rate if the amounts of their sales differed.

The use of trading stamps in selling goods justifies the imposition of license tax upon those so using the trading stamps, when the business not using such stamps not so taxed, sustained.

Rast v. Van Deman & L. Co., 240 U. S. 342, 60 L. ed., 679;
Tanner v. Little, 240 U. S. 369, 60 L. ed., 691.

In Singer Sewing Machine Co. v. Brickell 233 U. S. 304, 58 L. ed., 974, a license tax on the business of selling sewing machines was sustained, although merchants selling such machines at a located place of business were exempt.

In Central Lumber Co. v. S. Dakota, 226 U. S. 157, 57 L. ed., 164, an act was held to be constitutional which affected only those selling goods in two or more places in the State, and did not affect persons selling goods in less than two places.

A license tax upon a laundry business was sustained, though it exempted steam laundries and women engaged in the business where not more than two women were employed.

Quong Wing v. Kirkendall, 223 U. S. 59, 56 L. ed. 350.

A state may tax anthracite coal when ready for the market without taxing bituminous coal at the same time.

Heisler v. Colliery Co., 260 U. S. 245, 67 L. ed., 237.

A state may levy an occupation tax on the mining of ore without levying it on other mining, while at the same time exempting contractors who strip off the old burden of soil, and all owners and lessees who do extensive development work without striking the ore.

Oliver Iron Mining Co. v. Lord, 262 U. S. 172, 67 L. ed., 930.

A tax imposed upon ore mines is not unconstitutional because not extended to quarries, forests or other property.

Lake Superior Consolidated Iron Mines v. Lord, 271 U. S. 577, 70 L. ed., 1093.

The Court sustained a workmen's compensation act which excluded from its operation an industry which did not employ four or more workmen or operatives regularly in the same business or in or about the same establishment.

Ward v. Krinsky, 259 U. S. 503, 66 L. ed., 1033.

"Any classification is permissible which has a reasonable relation to some permitted end of governmental action."

It is not necessary that the basis of the classification be deducible from the nature of the things classified. It is enough, for instance, if the classification is reasonably found in the purposes and policies of taxation.

Watson v. State Comptroller, 254 U. S. 122, 65 L. ed., 170.

"The Fourteenth Amendment is not a pedagogical requirement of the impractical. The equal protection of the laws does not mean that all occupations that are called by the same name must be treated in the same way. The power of the State may be determined by degrees of evil or exercised in cases where detriment is specially experienced."

Dominion Hotel v. Arizona, 249 U. S. 265, 63 L. ed., 597.

The applicable rule was thus stated by the Chief Justice of this Court in Ohio Oil Company vs. Conway, 281 U. S. 146, at page 159:

> "The applicable principles are familiar. The states have a wide discretion in the imposition of taxes. When dealing with their proper domestic concerns, and not trenching upon the prerogatives of the national government or violating the guarantees of the Federal Constitution, the states have the attribute of sovereign powers in devising their fiscal systems to insure revenue and foster their local interests. The states, in the exercise of their taxing power, as with respect to the exertion of other powers, are subject to the requirements of the due process and the equal protection clauses of the Fourteenth Amendment, but that Amendment imposes no iron rule of equality, prohibiting the flexibility and variety that are appropriate to schemes of taxation. The state may tax real and personal property in a different manner. *It may grant exemptions.* The state is not limited to *ad valorem* taxation. It may impose different specific taxes upon different trades and professions and may vary the rates of excise upon various products. *In levying such taxes, the state is not required to resort to close distinctions or to maintain a precise, scientific uniformity with reference to composition, use or value.* To hold otherwise would be to subject the essential taxing power of the state to an intolerable supervision, hostile to the basic principles of our Government and wholly beyond the protection which the general clause of the Fourteenth Amendment was intended to assure."

We respectfully submit that the effect of these decisions is to remove any Federal question which might arise by virtue of the exemption of these species of property declared by Federal Courts to be competing moneyed capital

within the meaning of Section 5219 of the Revised Statutes. The State of Alabama had a right to make classifications and exempt property thus classified. The Supreme Court of Alabama has held that such classifications are reasonable and that in making such classifications the Legislature did not violate the equality clause of the State Constitution. It is submitted that under the numerous cases heretofore cited and others which we have not adverted to, these classifications are reasonable under the Fourteenth Amendment of the Federal Constitution. Therefore in taxing the shares of state banks and failing to tax mortgages, mortgage loan companies, and building and loan associations, the State did not violate either its own Constitution nor did it violate the equal protection clause of the Fourteenth Amendment. Classification is a legislative prerogative. It cannot be said that such classifications are unreasonable. The Supreme Court of Alabama has held that they were not. Therefore so far as the exemption of these species of property from ad valoreum taxation, the Petitioner cannot complain.

We respectfully submit that apart from the question of national banks, the Petitioner has been denied no constitutional right.

THE FAILURE TO LEVY A VALID TAX AGAINST NATIONAL BANK SHARES DOES NOT INVALIDATE THE TAXATION OF PETITIONER'S SHARES.

The question therefore arises whether the State's failure to tax the shares of national banks because of the restrictive provisions of Section 5219 destroys its right to tax the shares of state banks.

As pointed out, the taxation of the shares of state banks is not invalid either under the State or Federal Constitutions because certain species of property commonly called moneyed capital are exempt from ad valorem taxation in Alabama. We submit this is clear. The State Courts are not bound to accept the Federal definition of moneyed capi-

tal as applied to Section 5219 of the Revised Statutes. Moreover, they can divide and subdivide for purposes of classification such forms of property and exempt such as the Legislature deems fit so long as such classifications are not purely arbitrary and without semblance of reason. This power belongs to the State inherently. The Fourteenth Amendment does not seek to make the State conform to any certain system. It only guarantees equal protection. In making classifications as stated the power of the State is unlimited except those purely arbitrary.

The exemption of certain forms of property declared by the Federal Courts to be moneyed capital in competition with national banks within the meaning of Section 5219 of the Revised Statutes has rendered the taxation of the shares of certain national banks invalid because of the limitations of said Section 5219. The taxation of national banks if full power to tax were given, would not, we submit, be void under the Fourteenth Amendment despite these exemptions. The invalidity arises from the restrictive provisions of Section 5219 and not from the Fourteenth Amendment.

We respectfully submit that in order for this Court to declare that the taxation of the shares of this Petitioner is invalid, this Court must force on the State of Alabama the definition of moneyed capital as applied by the Federal Courts to Section 5219 and declare that such definition is controlling in deciding whether the Fourteenth Amendment to the Federal Constitution is transgressed.

National banks are instrumentalities of the United States and as such are exempt from all forms of State taxation unless Congress expressly permits.

> "Congress may prohibit any taxation of national banks by states, cities, counties or towns, and its mere silence on the subject if it were silent would be a prohibition."

First National Bank vs. Richmond, 13 Supreme Court Reporter, 1044, 149 U. S. 769, dismissing appeal 39 Fed. 309.

"The respective states would be wholly without power to levy any tax either direct or indirect upon the national banks, and property assets, or franchises were it not for the permissive legislation of Congress."

Citizens Savings Bank vs. Owensboro, 173 U. S. 636, 19 Supreme Court Reporter 530, 43 L. Ed. 840.

Therefore a national banks is not a subject over which the State has the power of taxation either inherent or otherwise except at the caprice of Congress.

Congress has permitted the states to exercise the power of taxation in the manner provided by Section 5219. So far as these provisions are of effect in Alabama and pertinent to this case, we call attention to the following:

The State may tax the real estate of national banks. This taxation has not been complained of and is, we presume, valid under the Fourteenth Amendment notwithstanding the fact that certain real estate such as that used for school purposes is exempt. Section 5219 is silent as to personal property, hence the states have no power to tax personal property belonging to a national bank.

The State of Alabama does tax the personal property of state banks and in doing so violates no provision of the State Constitution, and it is submitted does not violate the Fourteenth Amendment despite its failure to tax the personal property of national banks. The Fourteenth Amendment does not force the State to exempt property because similar property belongs to a Federal instrumentality and entirely exempt.

The State having received no grant of power from Congress to tax the personal property of national banks, the discrimination against the state banks and other persons

or corporations whose personal property is taxed, is not a violation of the uniformity clause of the State Constitution because those provisions apply only to those subjects of taxation which the State has inherent power and not to property exempt by its own Constitution, by the Federal Constitution or by law.

Neither, we submit, can the failure to tax personal property of national banks violate the Fourteenth Amendment. The Fourteenth Amendment certainly does not guarantee that the State shall tax property subject to those laws in the same manner it taxes property and agencies of the United States or other property not subject to its laws. Such an effect would be an absurdity.

Under Section 5219 of the Revised Statutes, the State of Alabama can tax the shares of national banks in a limited manner. The State of Alabama has not met those limitations, the effect thereof being to exempt the shares of national banks. It is submitted if national banks shares had been entirely exempted either by Congress or by the State of Alabama, such an exemption would not have rendered void the taxation of the shares of state banks. The effect of such action would be the same as in the case of tangible personal property. The Fourteenth Amendment does not require that the states in taxing their own subjects shall be required to exercise whatever limited power Congress may give to tax Federal instrumentalities and to tax its own creatures accordingly. Therefore, if the State of Alabama had declined to attempt the taxation of the shares of national banks entirely, no discrimination could have been complained of.

Does and can the exemption of national banks by indirection have any different effect? We submit it does not.

A national bank is a Federal instrumentality. As such it and its shares are withdrawn completely from the power of the State to tax. Congress may grant such power, but the power is not inherent or plenary, but is a granted or delegated power which can be withdrawn at any moment.

Congress has granted to the states the right to tax the shares of national banks upon certain prescribed conditions. The State of Alabama has failed or refused to comply with those conditions. The resulting effect is to exempt national bank shares from taxation as fully as if the Legislature by specific enactment had declared them so.

Can such an exemption of a subject of taxation, the right to tax which is not inherent but is granted and delegated, constitute a violation of the uniformity clause of the State Constitution or the Fourteenth Amendment?

To the first question, the Supreme Court of Alabama says "no." The decision declares unequivocally that Section 217 of the State Constitution applies to those subjects of taxation over which the State has inherent power and not to those subjects where the power is merely delegated.

Can the Fourteenth Amendment be given a different meaning? Can it be said that if the State of Alabama refuses entirely to tax the shares of national banks, its failure to so do does not discriminate against the shares of state banks, while if the State enacts a statute applicable to both except that other provisions of the same general act render invalid and in effect exempt national banks, make a discrimination against state banks in violation of the equal protection clause of the Fourteenth Amendment?

Such a position, we submit, is illogical. The case is not different, than if the Legislature had said the shares of all banks except national banks shall be taxed in the manner provided. If this were true no discrimination would result. Can this Court declare the situation different because under the provisions of Section 6 of the Revenue Act of 1923 taken alone national banks would be taxed, when the Court judicially knows that in the same general law are other provisions rendering the taxation of national banks unavailing? Does not the Court know, and did not the Legislature know that in enacting Section 6 along with the other provisions exempting mortgage companies and intangibles it was exempting national bank shares?

We submit the judgment of the Supreme Court is sound and ought to be affirmed. It would indeed be a far cry and a dangerous principle to declare that the Fourteenth Amendment limits the power of the State to tax its own subjects in the manner and to the extent Congress permits the taxation of Federal instrumentalities.

If it be true that the State can escape such effect by refusing entirely to exercise the power given by Congress, then can any different effect result when the State attempts and fails?

There is a general statute in Alabama taxing the property of hydroelectric plants. There is no exception of government owned plants, yet the Muscle Shoals plant, exactly the same species of property, is exempt, just as clearly as if a specific exception had been written therein. Neither the State or Federal Constitutions are violated thereby, for the guarantee of equal protection does not extend to those subjects over which the Legislature has no power. Can the failure, either by specific exception or otherwise, to exercise a limited power when granted destroy the State's power over those subjects, over which its power is inherent and plenary?

We submit the difference, if any, is one of degree, not of kind.

If Petitioner is correct that the failure to tax national bank shares renders invalid the taxation of state bank shares, this situation inevitably follows.

The State can not tax national banks because other moneyed capital in competition is taxed at a lower rate, the State cannot tax State banks because competing national banks are not taxed. Such moneyed capital cannot be taxed at all (presumably if congressional action is to be the measure) because competing state and national banks are not taxed. In other words the circle narrows and descends until everybody is exempt. This is not an absurd argument, if Petitioner's construction were correct.

Petitioner's brief relies for supporting Alabama authority on State Bank v. Board of Revenue, 91 Ala. 217. It is needless to point out that this decision invalidated a State statute which directly favored national banks over state banks. This was an Act of the State and no Federal statute or question was involved. In this case though, the Court decided that the Legislature classified bank shares and money and credits differently, the Court saying:

> "The words next succeeding declare what the Legislature intended to include in the words moneyed capital; *money loaned, solvent credits, credits of value. Bank shares* are *neither money loaned, solvent credits, nor credits of value; nor are the latter bank shares. They are, each of them, a species, and only a species, of the generic class, moneyed capital.* Hence, if we interpret, by itself, the language of the statute we have copied, we would be forced to hold that the Legislature did not intend to include bank shares in the class they declared should have the right to deduct the amount of their indebtedness, and pay taxes only on the residue."

It is to be noted that the Legislature in the present law classified or enumerated money and credits, separately from bank shares as subjects for taxation or exemption.

However the State Bank v. Board of Revenue was before the Supreme Court of Alabama in the present case, and we submit any persuasive force it might have is answered by this latest pronouncement of the Supreme Court of Alabama.

Petitioner on page 25 et seq. of its brief takes the Supreme Court of Alabama to task for use of the word "delegated" powers. He goes back to the principles upon which this Government was founded and re-states those elementary principles which the Court of course knows without any re-statement; that the Federal Government is a Government of delegated powers and not of inherent powers;

that the states have inherent power over all subjects not surrendered to the Federal Government. Thus he argues that the Federal Government could not delegate to the states the right to tax national banks. Of course that was the original conception of Government and as a philosophical doctrine it is still subscribed to. Since the great political revolution of 1865-1870, we fear it is a principle largely functus officio.

However, to argue that because the word "delegate" is not absolutely technically correct, and that the correctness of the decision of the majority is thereby affected seems to give an import to those words, both technical and strained. Whatever may be the technical correctness of the use of the word "delegate," the fact is that states have no power whatsoever to tax national banks except as allowed by Congress. Whether to call this a delegation of power, a permission of power, a conferring of power, seems unimportant. Whatever right, power, jurisdiction, or authority which the states can exercise is by the gift of the Federal Congress. If the states had any inherent right it was surrendered at the formation of the Constitution or at least it died with the case of McCulloch vs. Maryland.

Hence as we see it, whether the power be termed a permission, a delegation or a grant is unimportant. The fact remains that this is property within the State over which the State in itself has no power of taxation, that Congress for a temporary period of time has granted the states power to tax this property under certain conditions. This power Congress can take away at any moment leaving it absolutely exempt. The taxation power and the uniformity provisions of the State Constitution are not temporary things. We submit that the decision of the majority holding that these provisions applied to those subjects of taxation as to which the State is clothed with inherent and unlimited sovereignty is fundamentally sound and logical.

Otherwise we have this situation. Congress today permits the taxation of the shares of national banks in such

a manner according to Petitioner's contention as to, under our laws, invalidate the taxation of state banks. Tomorrow Congress destroys entirely or repeals entirely Section 5219 leaving the states powerless to tax national banks, real property, shares or anything else. Thereupon the taxation of state banks is validated. There being no conflict with national banks, there is no discrimination against the state banks. This is nothing more nor less than congressional legislation on local matters.

GENERAL ARGUMENT

Petitioner cites on page 19 of his brief numerous decisions of this Court in support of its contention.

Of these, the recent case of Central State Bank vs. Bennett, 284 U. S. 239, is we submit the only case that can be taken as authority in the present case.

In this case, it appears that Iowa had a classified property tax. That state and national bank shares and moneyed capital were separately classified for purposes of taxation. That the shares of competing corporations were assessed at the same rate and in the same class as bank shares, but the Auditor in making up the tax list wrongfully extended them as money and credits under a different classification and a definitely different rate.

As to national banks, Section 5219 was violated. That is not here before us.

As to the state banks this Court said:

> "Both petitioners claim that they have been subject to intentional systematic discrimination in violation of the Fourteenth Amendment. The Federal right of the Central State Bank rests wholly upon that clause. It is assumed that there was such inequality of treatment as the Constitution forbids."

We respectfully submit the facts are so materially different that the decision in this case cannot be controlling.

First, there is no classified property tax in the State of Alabama. All taxable property must be taxed at the same rate. This rate is fixed by the Constitution. This constitutional provision does not forbid exemptions.

Authorities supra.

Under the Fourteenth Amendment the State may grant exemptions.

Therefore in exempting the species of property complained of the Legislature was not violating either the Constitution of Alabama or the Federal Constitution.

We believe it a reasonable assumption to say the State can make its own classifications for purposes of exemption, and unless wholly arbitrary this Court is bound thereby.

If it chose to exempt those species defined by the Federal Courts as competing capital within the meaning of Section 5219, it did not thereby deny equal protection to this Petitioner.

The effect though of such exemptions is to exempt national bank shares. This exemption arises because of lack of power over national banks.

This question, we submit, has been correctly answered by the Supreme Court of Alabama. The guarantees of the State and we submit, the Federal Constitutions apply to those subjects over which the State has inherent power and not a mere granted or delegated power.

Otherwise this situation perforce arises.

The State must tax all taxable property at the same rate. If it taxed Federal instrumentalities in any way, then it perforce must tax all its subjects of taxation in the same manner. Under the State Constitution, if it taxes at all, it must tax uniformly. The Highest Court of the State

has said this equality clause did not apply to property over which the State has not inherent power.

Can this Court go further and declare that the Fourteenth Amendment forbids exemptions, and force the State to conform, not to the equality guaranteed by its own laws, but to Congressional ideas and restrictions?

If the failure to tax national bank shares invalidates the taxation of state bank shares, what will be the effect on other forms of property taxation. Sections 211 and 217 provide for the taxation of all taxable property at the same rate. State bank shares are taxable property. If untaxed or taxed at a lower rate, can not it seriously affect the State's power to tax other forms of property at ad valorem rates? Clearly if there are any forms of a similar nature they can complain.

We submit, Petitioner's case depends on whether this Court says that the granting of the exemptions complained of, is a denial of the equal protection clause of the Fourteenth Amendment .

We submit that there is no proper Federal question involved. The Supreme Court of Alabama is the proper authority, to decide whether the granting of the exemptions complained of, makes an unlawful discrimination against Petitioner. It has decided contrary to Petitioner's claim. The exemption of national bank shares incidentally results from such exercise of the Legislature's constitutional prerogative. The case hinges though, not on this fact, but on the primary power of the State to make these exemptions. If such action were constitutional, the mere fact that because of Section 5219, national bank shares escape, cannot give the Petitioner a right to invoke the Fourteenth Amendment which would not otherwise exist.

As we understand the decision of this Court in Central Bank vs. Bennett, it rests on the unequal taxation of state bank shares and other property classified and declared by statute to be in the same class and subject to the same rate.

The decision was not based on the failure to tax national bank shares, or at least there is no specific language so holding.

The decision based on the findings or assumptions of the Iowa Court, cannot we submit, be in any way conclusive in the present case. The Supreme Court of Alabama has decided that these exemptions constituted no denial of constitutional rights.

Certain Federal cases cited by Petitioner involved the question that systematic undervaluation of other property was asserted to violate the equal protection clause of the Fourteenth Amendment. No question of valuation is here involved and the cases are not applicable. Others involved violations of Section 5219. They have no bearing on the present case.

The several decisions of other State Courts cited are not authority. The Supreme Court of Alabama having decided the State question here involved.

CONCLUSION.

In conclusion we respectfully submit that the real and sole question here involved is this: Did the Legislature by differently classifying mortgage companies, building and loan associations, industrial loan companies, mortgages and money and credits from state bank stock, and exempting them from ad valorem taxation while subjecting the shares of state banks to such taxation violate the Fourteenth Amendment to the Constitution of the United States? In answer to this we submit:

First. The power to classify is a legislative power and cannot be overturned by the Courts unless such classification is purely arbitrary.

Authorities supra.

> "The constitutionality of a law is not to be determined on a question of fact to be ascertained by the court. If under any possible state of facts an act would be constitutional, the courts are bound to presume that such facts exist."

6 R. C. L. 112.

> "Whenever the determination by the Legislature is in reference to opinion or debatable questions concerning which there is a reasonable ground for difference of opinion, and there is probable basis for sustaining the conclusion reached, its findings are not subject to judicial review."

6 R. C. L. 114, Section 113.

In Powell vs. Pennsylvania, 127 U. S. 678, 32 L. ed. 253, it was held (quoting from the headnote):

> "The legislative determination of such question is conclusive upon the courts, unless it appears that upon the face of the statute, or from the facts of which the courts must take judicial cognizance, that the statute infringes rights secured by fundamental law."

Second. The Legislature did separately classify mortgages and solvent credits. The exemption appears in Section 2 of the Acts of 1923 along with numerous other exemptions.

Third. The Legislature separately classified mortgage companies, building and loan associations, and industrial loan companies. This appears from their inclusion in and exception from the Act of 1927 levying a tax on the shares of general corporations.

Fourth. These classifications are reasonable. There are many and substantial differences between these forms of

property and bank stock. There are many differences in the power of and the manner and nature of business done by mortgage companies, building and loan associations, and industrial loan companies, and those powers of and business done by banks.

Fifth. Under the cases heretofore cited these classifications are not unreasonable or arbitrary.

Sixth. The Supreme Court of Alabama has upheld them.

Seventh. The State can make exemptions without violating the Fourteenth Amendment.

Ohio Oil Company vs. Conway, supra.

Therefore having made classifications not purely arbitrary and exempted the species of property so classified the constitutional rights of this Petitioner have not been denied.

The failure to levy a valid tax on an instrumentality of the United States cannot, we submit, render invalid a tax otherwise valid and constitutional.

We respectfully submit there is no proper Federal question and the writ of certiorari should be denied.

Respectfully submitted,

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